

WJA
1113-15-06

**IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE,
AT NASHVILLE-DIVISION I**

STATE OF TENNESSEE

v.

PERRY A. MARCH

Case No. 99-B-1290

2006 FEB 22 AM 10:15
DAVIDSON COUNTY CLERK
HEATH

SECOND RULE 12(D) (2) MOTION

The State has responded to Defendants 12 (d) motion by asserting that it intends to use as evidence all information provided in discovery (with limited exceptions) and included an additional seventy-five (75) pages which the State by letter of 12/20/05 indicated as "Not previously provided (attached Exhibit 1). Pursuant to Rule of Conduct 1.15 Defendant requested information from LMOG who referred this office to the District Attorney General who forwarded an additional fifty-one (51) pages. (Attached as Exhibit 1) much of which was duplicates).

Defendant's previous Rule 12 (d) (2) Motion is set forth verbatim:

Comes now the Defendant, **PERRY AVRAM MARCH**, by and through counsel, C. Edward Fowlkes, pursuant to Rule 12(d) of the Tennessee Rules of Criminal Procedure, and moves this Court to order the State to comply in writing with the mandatory provisions of Tenn.R.Crim.P. 12(d)(2). The Defendant would show as follows:

- 1) The Defendant was arraigned in this matter on August 17, 2005. Counsel for the Defendant on August 19, 2005 served a written request for discovery on the office of the District Attorney General.
- 2) The Defendant's request for discovery at page 7 thereof specifically stated the accused's request pursuant to Tenn.R.Crim.P. 12(d)(2) that the State give notice of its intention to use (in its evidence in chief at trial) any evidence which is discoverable under Tenn.R.Crim.P. 16.
- 3) Despite the mandatory provisions of §§ 10.01 and 10.02 of the Local Rules of Practice, the pretrial scheduling order provided to the parties at the time of arraignment failed

to address any issue(s) related to discovery. Counsel for the State on September 21, 2005 served an initial written response to the Defendant's Motion for Bill of Particulars. This

served an initial written response to the Defendant's Motion for Bill of Particulars. This initial discovery response, which included a significant volume of material, nevertheless completely omitted any mention of the Defendant's Rule 12(d)(2) request.

4) Defense counsel by this motion request the Court to order counsel for the State to respond in writing to the Defendant's Rule 12(d)(2) request, with the requisite specificity contemplated by the opinion of the Court of Criminal Appeals of Tennessee in *State v. Louis Francis Giannini*, C.C.A. No. 36 (Shelby Co.), 1991 Tenn. Crim. App. LEXIS 477, **13-14 (June 12, 1991) (copy attached):

The purpose of Rule 12(d)(2) is to afford the accused an opportunity to suppress any evidence that (a) the State intends to use in its case-in-chief and (b) is discoverable pursuant to Rule 16. . . . Contrary to the contention of the assistant district attorney general, compliance with Rule 12(d)(2) by the State is not discretionary. The rule contemplates compliance by the State. When the State fails to comply with a defense motion predicated upon this rule, the trial court can order compliance. Moreover, responding that the State intends to "use in its evidence in chief at trial all evidence to which the defendant may be entitled discovery pursuant to Rule 16" does not constitute compliance with the rule. Such a response does not comport with the spirit or letter of Rule 12. The rule contemplates that the State will provide the defendant with specific information concerning the evidence the State intends to introduce.

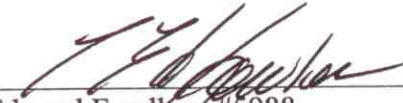
The Defendant would observe further that "testimony regarding items of evidence that could be suppressed must also be included in a Rule 12(d)(2) notice." *State of Tennessee v. Thomas Dee Huskey*, C.C.A. No. E1999-00438-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 550, *351 (June 28, 2002) (copy attached). Discovery under Tenn.R.Crim.P. 16 is not an opportunity to play hide the ball, nor to play hide the testimony about the ball, by means of a "document dump" more commonly employed as an abusive discovery tactic in civil litigation.

THE FOREGOING PREMISES CONSIDERED, the Defendant moves the Court to order counsel for the State to comply in writing with the mandatory provisions of Tenn.R.Crim.P. 12(d)(2) by provide the defendant with specific information concerning which evidence, discoverable under Tenn.R.Crim.P. 16, that the State intends to introduce.

Defendant therefore moves that the state be required to properly respond to Defendant's 12(d)(2) motion setting forth specifically the documents it intends to introduce at trial. There are clients listed who apparently have nothing to do with this case dating back to 1991. Should the state not properly respond the Defense will by necessity be forced to file Motions in Limine/Motions to

Suppress which when taken page by page will encompass a minimum of a half day and possibly more. This useless expenditure of time is what the Rule seeks to avoid.

Respectfully Submitted,


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Certificate of Service

I hereby certify that a true and accurate copy of the foregoing Motion was forwarded by U. S. Mail, postage prepaid, ***Amy Eisenbeck and Ben Winters***, Assistant District Attorney General, 222 Second Avenue North, Suite 500, Nashville, TN 37201, and on this 22nd day of February, 2006.


C. Edward Fowlkes

THIS MOTION IS EXPECTED TO BE HEARD ON MARCH __, 2006 AT __.M.